

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK T. CARSON,

Defendant and Appellant.

D073620

(Super. Ct. No. SCD271765)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed in part, vacated in part with directions.

Benjamin Kington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted Mark Carson of two counts of forcible oral copulation (Pen. Code,¹ § 288a, subd. (c)(2)(A); counts 1, 2); assault during a first degree burglary (§ 220, subd. (b); count 3); assault with a deadly weapon (§ 245, subd. (a)(1); count 6); making a criminal threat (§ 422; count 7); and false imprisonment by violence, menace, fraud, or deceit (§§ 236, 237, subd. (a); count 8). The jury found true allegations Carson committed counts 1 and 2 during the commission of a burglary while using a deadly weapon (§ 667.61, subds. (a)–(e)). In connection with the same counts, the jury also found true he had prior convictions within the meaning of section 667.61, subdivisions (a), (c), and (d) for rape by force (§ 261, subd. (2)) and oral copulation by force (former § 288a, subd. (c)), which qualified him as a habitual sex offender within the meaning of section 667.71, subdivision (a). The jury found true allegations Carson used a deadly weapon within the meaning of section 12022.3, subdivision (a) in connection with counts 1 through 3 and similarly used a deadly and dangerous weapon within the meaning of section 12022.3, subdivision (b)(1) in connection with counts 7 and 8. The jury also found true allegations Carson suffered two prior strike convictions (§§ 667, subds. (b)–(i), 1170.12) and two serious felony priors (§ 667, subd. (a)(1)).

The court imposed an aggregate term of 14 years plus 175 years to life based upon two consecutive terms of 75 years to life plus four years each for counts 1 and 2, a

¹ Statutory references are to the Penal Code unless otherwise stated.

consecutive four-year term for the weapon enhancement for count 3, a consecutive one year term for the weapon enhancement for count 7, and a consecutive term of 25 years to life plus one year for count 8.

Carson raises several issues regarding his conviction on appeal. First, he contends the trial court erred in allowing a police officer to testify he believed the victim and the victim appeared to be in shock based on the officer's experience with other sexual assault victims. Second, he contends the prosecutor committed misconduct in closing statements by: (a) saying it was offensive for defense counsel to display a photograph of the victim while asking the jury to believe the victim wanted to hide a secret about his sexuality and (b) concluding rebuttal arguments saying, "Enough is enough. He's out of control. You are in control." Third, Carson contends the admission of evidence about Carson's prior convictions under Evidence Code section 1108 violated his rights under the federal Constitution, but acknowledges the California Supreme Court has rejected this position. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922 (*Falsetta*).) Fourth, Carson contends the cumulative effect of the errors violated his constitutional rights. We reject each of these contentions and affirm the judgment of conviction.

We agree, however, that the court should have imposed sentences for counts 1 and 2 pursuant to only one sentencing scheme, either the Habitual Sex Offender law or the One Strike law. We therefore vacate the stayed sentences of 75 years to life imposed for counts 1 and 2 pursuant to section 667.61, subdivisions (a), (c), (d), and (e) as well as the stayed sentences of 45 years to life imposed pursuant to section 667.61, subdivisions (b), (c), and (e). Carson contends, the People concede, and we agree the enhancements

attached to counts 3 and 7 should be stayed. We direct the clerk of the court on remand to correct the court minutes and the abstract of judgment consistent with our opinion.

II

BACKGROUND

A

1

The victim became acquainted with Carson as neighbors in a small apartment complex. They exchanged pleasantries and occasionally chatted when they saw each other around the complex. Carson told the victim he had served a lengthy prison sentence, but did not say why.

Carson asked the victim for help with computer and phone issues. The victim generally offered advice. The victim occasionally worked on the computer in Carson's apartment and one time in the victim's apartment.

On one occasion, Carson gave the victim money to buy beer to thank the victim for the computer work. The victim brought the beer back to Carson's apartment where they split three beers and talked about politics, the weather, and matters within the apartment complex. The victim denied any romantic or sexual relationship with Carson.

The victim did not see Carson for a couple of weeks before the incident. He became uncomfortable around Carson because it appeared there were no actual technical problems with the computer and Carson had become anxious and jumpy.

On the morning of April 24, 2017, the victim was getting ready for work. About fifteen minutes after the victim's roommate left the apartment, Carson knocked on the victim's security screen door and asked to borrow the victim's phone. Carson said he had locked himself out of his apartment and needed to call his brother who had a spare key.

After initially saying he was running late, the victim relented and handed Carson the phone through the door. The victim told Carson to put the phone on a cabinet next to the door when he was finished. The victim returned to the bedroom to get ready for work.

The victim heard the door close and something drop on the couch. When the victim turned around, he saw Carson rushing at him with a knife and angrily muttering something.

When the victim yelled for help, Carson told him to shut up. Carson kissed the victim on the mouth while holding the knife.

Carson ordered the victim to get on the bed. When the victim initially refused, Carson yelled and pointed the knife at the victim. Carson was demanding and angry. When the victim sat down on the bed, Carson ordered him to lie back. After Carson again threatened the victim with the knife, the victim complied.

The victim begged Carson to stop. Carson lunged at the victim with the knife. The victim tried to grab Carson's arms, but Carson overpowered the victim. When the victim kicked at Carson, Carson swung the knife and cut the victim's jeans and leg. The victim laid back, but continued to beg Carson to stop.

Carson told the victim to shut up and said he would stab the victim in the heart if he kept screaming. The victim lowered his voice, but continued pleading with Carson to stop. Carson held the knife to the victim's throat and asked if he wanted to live or die. When the victim said he wanted to live, Carson told the victim to remove his pants and underwear. The victim complied.

Carson said he wanted to do this for a long time and began orally copulating the victim. The victim talked to Carson about the times he helped Carson. The victim tried to remind Carson he was a person.

Carson stopped and ordered the victim to "make it hard." Carson held the knife and occasionally pointed it at the victim. The victim tried to masturbate at Carson's direction. When the victim failed to get an erection, Carson appeared frustrated and again orally copulated the victim. The victim continued trying to talk his way out of the situation by appealing to Carson's humanity.

Carson eventually stopped, backed away, and told the victim to pull up his pants. Carson sat down in a desk chair and faced the bed. Carson told the victim to stop crying. Carson still held the knife and spoke assertively, but did not appear as enraged. Carson said he had lusted after the victim for a long time and had planned to do this since the victim moved into the apartment complex. Carson never mentioned his sexual desires toward the victim before this incident.

Carson told the victim he could not leave or go to the police. The victim tried to reassure Carson he would not go to the police. Eventually, Carson told the victim to

follow him into the living room and to sit on the couch. Carson, who still held the knife, positioned a chair to face the victim.

Carson put the knife away in his briefcase and took out a hypodermic needle containing a clear substance. Carson said he did not want to go back to jail. He said the syringe contained enough insulin to kill himself. The victim told Carson he needed to get help.

Carson called his brother from the victim's phone and left a message saying, "I'm at the guy's house, [the victim's] house (CRYING) I-I-I forced myself on him. I've taken some insulin to overdose. I couldn't take it anymore. But I love you and I love mom. I didn't know what else to do. [The victim] was a good friend and I-I pulled a knife on him. If you get this message before I – call, all right, bye."

Carson injected the insulin. As the victim tried to convince Carson to get medical help, Carson pulled out a second syringe and injected himself.

Carson then said he wanted to call the suicide hotline from his own apartment's phone. Carson asked the victim if he had cash. The victim handed Carson money. Carson took the money, unlocked the victim's apartment doors, and stepped outside. Carson ordered the victim to get up and come with him.

When the victim refused to enter Carson's apartment, Carson grabbed a phone from inside the door and called the suicide hotline. Carson began to wobble around and said he was low on blood sugar. Carson went inside and got some fruit. When he came back, he returned the victim's money, and directed the victim to buy Carson cigarettes and something sweet at a nearby gas station market.

The victim went to the market. The victim said he was stunned and did not know what to do. As he stood in line to pay for some items, the victim texted his roommate about what happened. When the roommate responded saying he should run to a nearby coffee shop, it was the "kick" the victim needed to get his brain going. After completing his purchase, the victim ran to the coffee shop as fast as he could. Video surveillance shows the victim texting in line at the store and running out of the store after completing his purchase.

The victim ran to a nearby coffee shop where he knew the owner and workers. He asked for help and texted his roommate again. The victim called 911 and waited for police officers.

The victim said he discussed his sexuality with Carson upon Carson's questioning, but did not tell Carson he was gay. The victim denied he had consensual sexual contact with Carson either on the day of the incident or at any other time. He denied being in a relationship with Carson and denied they discussed telling his roommate and Carson's brother about a romantic relationship.

The coffee shop owner and another worker at the coffee shop described the victim as typically very calm, easygoing, friendly, and talkative. On the day of the incident, however, the victim ran into the shop with fear in his eyes, shaking, and talking hysterically. The victim said something about rape. After calming down, the victim said

a man in his apartment complex attacked him. He mentioned the neighbor had a knife. After police officers arrived, the coffee shop worker said the victim seemed to be in shock. He was more calm, but was still traumatized.

The first responding officer, who had completed training a few weeks earlier, spoke with the victim and photographed the victim's injuries and clothing. In response to a question about the victim's demeanor, the officer stated the victim's behavior was not what he would expect because the victim was nervously laughing and downplaying what happened. The officer said he later realized the victim was probably in shock.

A police detective who also interviewed the victim at the scene stated the victim appeared nervous. He made jokes and laughed or giggled periodically, but this subsided as the detective asked more detailed questions. The detective felt the victim was using a coping mechanism.

The victim underwent a Sexual Assault Response Team (SART) examination with a nurse. The victim had a rip in the lower right leg of his pants and a cut on the right foot. He also had a cut on his right lower leg.

The nurse stated the victim was forthcoming with information and laughed at some points. In the nurse's experience, the victim's demeanor was consistent with someone who is in shock. She believed his laughter at certain points was a nervous reaction.

The victim told the nurse he had known Carson for a couple of years living in the same apartment complex. The victim said he helped Carson with computer matters, up to

five times a week. The victim had not seen Carson for two to three weeks before the assault because the victim felt Carson was displaying strange behavior.

DNA profiles were highly consistent with Carson being a major contributor to the profiles found from both the penile and scrotal swabs taken during the SART exam as well as from the handle of the knife. DNA consistent with the victim's profile was found on the blade of the knife mixed with a smaller amount of DNA consistent with Carson's profile.

C

1

Carson testified in his own defense. Carson identified his sexual orientation as gay. He stated he was molested as a youth by a man. Carson admitted he pleaded guilty to forcibly raping two female victims in separate incidents in 1987 and using a knife as a weapon in both instances. He also pleaded guilty to forcible oral copulation. Carson said he committed these crimes due to his feelings of anger and self-hatred. He said he was on drugs and was struggling with his own sexuality. He served nearly 30 years in jail. He claims he came to terms with his identity as a gay man in jail, but was concerned about how he would be accepted by his family and the community.

Carson admitted he pleaded guilty to committing a sexual assault on another woman in 2007, after he was released from jail. He attributed the crime to the use of crack cocaine and his unwillingness to confront his demons.

Carson said he met the victim in the apartment complex. They engaged in small talk and the victim helped Carson with his computer. He claimed they developed a sexual relationship and he saw the victim four to five times per week.

Carson claimed the victim said he was gay, but the victim did not want anyone to know about his relationship with Carson. Carson claimed he loved the victim because the victim was not judgmental about Carson's past.

Carson claimed he encouraged the victim to come out of the closet, but the victim was not ready. Carson claimed the victim reacted poorly to the pressure to come out of the closet and threatened he would call the police on Carson.

Carson claimed he went to the victim's apartment on the morning of the incident and they consensually kissed, touched, and Carson orally copulated the victim. He stated the victim had an erection and ejaculated on a tissue. Carson denied raping the victim.

Carson said he told the victim they needed to reveal their relationship to the victim's roommate and Carson's brother. Carson said he would expose the victim. The victim ended the relationship and threatened to get Carson out of the apartment complex. Carson said the victim threatened to tell the police Carson sexually assaulted him.

Carson became enraged and pulled a knife out of a bag he brought to the apartment. He said he always carried a knife, but denied using the knife on the victim. Carson claimed the victim kicked at the knife and it caught on his leg as he kicked.

Carson injected himself with two vials of insulin with the intention of killing himself. Carson acknowledged he left a voice mail message for his brother. When he told his brother that he "forced" himself on the victim, Carson said he meant he tried to force the victim to come out of the closet. Carson said he pulled a knife out, but did not pull it on the victim.

Carson claimed he and the victim went to Carson's apartment to continue talking. Carson ate some fruit to slow the insulin. He asked the victim to go to the store to get candy and cigarettes. When the victim did not return, Carson went to a friend's house where he contacted County Mental Health about his suicidal thoughts. He was evaluated at a hospital a day or two later.

III

DISCUSSION

A

Officer's Testimony

Carson contends the court prejudicially erred in allowing the first interviewing officer to testify that he believed the victim based on his experience with sexual assault victims. "We review a trial court's decision to admit or exclude evidence 'for abuse of discretion, and [the ruling] will not be disturbed unless there is a showing that the trial court acted in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice.' " (*People v. Powell* (2018) 5 Cal.5th 921, 951 (*Powell*).)

1

We begin with a review of the testimony. In response to a question about the victim's demeanor, the first responding officer stated: "At first impression he wasn't acting the way I would expect someone to be acting who went through something like that. Reflecting on it later, I realized he was probably in shock, but he was almost downplaying what happened and kind of nervously laughing about it which kind of took us a little bit to get used to because there's a lot of things that this—this wasn't very normal, I guess, but he told us the story over and over and everything lined up and—so it's—we believed what he said."

When the prosecutor asked the officer to explain what he meant by saying the victim appeared to be in shock, the officer stated, "I was pretty new on patrol ... when this happened, and from dealing with people in other situations like this, getting more

used to how people are acting." Defense counsel objected asserting the testimony lacked foundation and called for expert testimony. When the court overruled the objection, the officer continued, "Just more contacts with victims, I guess, and seeing how people react differently to different situations, it made a lot more sense why he was acting the way he was."

Expert testimony about the credibility of a witness is not generally admissible because " 'the jury is generally as well equipped as the expert to discern whether a witness is being truthful.' " (*People v. Sanchez* (2019) 7 Cal.5th 14, 46.) However, unlike in *People v. Sergill* (1982) 138 Cal.App.3d 34, 38, the prosecutor here did not ask the officer for his opinion about the victim's veracity. She asked the officer to describe the victim's demeanor. Further, contrary to Carson's characterization, the officer's comment about believing the witness was not based on his experience with sexual assault victims. The officer said he believed the victim once he saw how the evidence lined up with the victim's story, which he told consistently. Defense counsel did not object, move to strike, or ask for an admonishment regarding the officer's comment about believing the victim. Therefore, Carson forfeited this claim. (Evid. Code, §353, subd. (b); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81–82.) Defense counsel's later objection to the foundation of the officer's testimony regarding his experience with shock victims was insufficient to preserve the issue of the testimony regarding credibility on appeal. (*People v. Jones* (2012) 54 Cal.4th 1, 61.)

To the extent Carson is also challenging the court's admission of testimony about the victim's behavior being consistent with someone in shock, we conclude the court did not abuse its discretion. Lay opinion testimony is admissible if it is rationally based on the perception of the witness and is helpful to understanding his or her testimony. (Evid. Code, § 800; *People v. Medina* (1990) 51 Cal.3d 870, 887.) The officer testified to his

observations of the victim's demeanor and explained, based upon additional experience, it appeared he was in shock.

Even if there were error, it was harmless. "When evidence is erroneously admitted, we do not reverse a conviction unless it is reasonably probable that a result more favorable to the defendant would have occurred absent the error." (*Powell, supra*, 5 Cal.5th at p. 951.)

Several witnesses testified, without objection, about the victim's demeanor being consistent with shock. These witnesses included a worker at the coffee shop, a detective, and the SART nurse. It is not reasonably probable Carson would have obtained a more favorable result absent the officer's brief testimony in this regard.

B

Prosecutor's Statements

Carson contends the prosecutor committed misconduct by disparaging defense counsel and by appealing to the jury to take control and convict Carson based on prior convictions. We consider the issues separately.

" ' "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." ' " (*People v. Jackson* (2016) 1 Cal.5th 269, 349 (*Jackson*).) " ' "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must

show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' ' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 765.) "This is not a low standard to meet, since ' ' "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." ' ' " (*People v. Spencer* (2018) 5 Cal.5th 642, 684.)

1

In closing statements, defense counsel displayed an old photograph of the victim as he presented an argument intending to imply the victim was lying because he was hiding a secret about his sexuality. Defense counsel stated, "I want to talk about [the victim] himself ... it's easy to hear and feel like he is the victim in this case, but the fact of the matter is he's a 25-year-old kid, and it is easy at 25 years old to feel like your problems are the biggest problems in the world and to be self-centered and self-important and ... to be a tall, good-looking white kid who's been to college and is smart and who's never had one second of prejudice against him in his life, and he does not want to find out what that's like, and to him at 25 years old, an immature 25-year-old kid, that secret that he's keeping inside him is the biggest secret in the world. It's the most important thing in the world to hide, and he doesn't care if he has to ruin someone's life to keep that a secret. He doesn't care because his problems at 25 are more important than anyone else, than all of yours, than mine, more important than the idea of sending a man to prison." Counsel then stated, "You've spent a good amount of time with [the victim] at this point. Are you telling me that that's not possible, that that's not a reasonable conclusion based upon the facts that you heard in this case?"

In rebuttal, the prosecutor stated, "The defense attorney as he argued that our 25-year-old victim was self-centered, self-important, keeping a secret more important than anyone else, the secret he's referring to is the secret that ... the defendant claims that [the victim] is gay, and during that entire argument, he left out commenting upon a photograph of [the victim], not from the day of the incident so if this is all about April 24th, 2017, why are we staring at [the victim, the victim's] face as the defense is arguing that he is gay, and you spent time with him. Are you telling me that it's not reasonable—or a reasonable conclusion that that's the secret he's keeping? Do you know what he's asking you to do? He's asking you to look at a photograph and say that photograph, [the victim] looks gay. That's what he's asking. That should offend you." The prosecutor concluded, "[t]hat simply looking at someone, you could conclude their sexual identity. That is offensive."

Defense counsel objected saying the prosecutor's argument was as an improper ad hominem argument. The prosecutor said that making the defense argument while showing the photograph was offense, she was not calling defense counsel offensive.

The court overruled defense counsel's objections and denied a motion for mistrial. The court stated the prosecutor did not call defense counsel a liar or despicable, but called out as offensive the strategy of showing a photo of the victim while arguing the victim had a secret.

"Personal attacks on the integrity of opposing counsel can constitute misconduct. [Citation.] 'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury

[citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom.' [Citation.] However, 'the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.' " (*People v. Winbush* (2017) 2 Cal.5th 402, 484.) "[An] argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*Jackson, supra*, 1 Cal.5th at p. 368, internal quotations omitted.)

We conclude there was no misconduct. The prosecutor did not denigrate counsel or challenge his credibility. The prosecutor's argument was fair comment on defense counsel's tactic of showing a picture of the victim while arguing the victim was lying to keep a secret about his sexuality.

2

After arguing a verdict of guilt was the only reasonable conclusion based on the evidence, the prosecutor concluded her rebuttal argument saying, "The defendant is entitled to ... a trial by jury. He's entitled to his day in court. He had both of those things. He also has the right to be found guilty by each and every one of you. [¶] Now, ladies and gentlemen, is the time. Now is the time. Enough is enough. He's out of control. You are in control. You must find him guilty of each and every count in this case and find all of those allegations true."

Defense counsel objected to the "enough is enough" argument saying it encouraged the jury to punish Carson for his prior crimes. The prosecutor explained she

meant Carson had due process and the jury, not Carson, was now in control. The court overruled the objection noting there was evidence Carson had already been convicted and punished for the prior acts.

The prosecutor's comment regarding Carson now being "out of control" and the jury being "in control" was consistent with the prosecutor's theme throughout the arguments that the case was about "power and control" exercised by the defendant in this sexual assault. The prosecutor commented on the change in Carson's behavior between when he was in control on direct examination and when he was not in control on cross-examination. The prosecutor commented about how Carson attempted to exert control during the incident. Her rebuttal comments emphasized the jury was now in control and should find him guilty.

The "enough is enough" comment appeared tied to the prosecutor's observation that Carson obtained due process through the trial and it was time for the jury to decide the case. Even if the comment could be construed as a reference to the prior convictions, the prosecutor did not appeal to passion or prejudice to punish Carson for those convictions, for which the jury heard he had already served time. The prosecutor read the pattern jury instruction (CALCRIM No. 1191A) regarding the extent to which the jury could consider the prior uncharged offenses. The prosecutor stated she had a duty to present the argument, but emphasized there was sufficient evidence in this case alone to convict Carson. Under these circumstances, we conclude there is no reasonable likelihood the jury understood or applied the prosecutor's comments in an improper or erroneous manner.

C

Propensity Evidence

Carson contends the court violated his due process rights under the federal Constitution by admitting evidence of prior convictions as propensity evidence under Evidence Code section 1108. Carson acknowledges the Supreme Court rejected a similar due process challenge in *Falsetta*, *supra*, 21 Cal.4th at p. 917 and states he is preserving the issue for later federal review. In *Falsetta*, the Supreme Court stated Evidence Code section 1108 is an exception to the general rule prohibiting propensity evidence and permits evidence of other sexual offenses in an action accusing the defendant of a sexual offense so long as the trial court engages in a careful weighing process under Evidence Code section 352 to determine if propensity evidence is unduly prejudicial. (*Falsetta*, at pp. 916–917.) " "This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." " (*Id.* at pp. 917–918.)

In this case, the court carefully weighed the probative value of the prior convictions against the prejudicial effect as required by Evidence Code sections 352 and 1108. The court considered the fact that the prior acts from 1987 involved forcible rape and forcible oral copulation with a knife and the 2007 crime involved rape. The prosecutor agreed to sanitize the evidence to omit information about the victims being minors. We are bound to follow *Falsetta* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and we conclude Carson's due process rights were not violated because the court properly exercised its discretion in admitting the evidence of the prior convictions.

D

No Cumulative Error

Because we find no error or no prejudice as to each of the asserted claims, it follows that any cumulative effect of the claimed errors " " does not warrant reversal of the judgment." " (*People v. Jablonski* (2006) 37 Cal.4th 774, 825.)

E

Sentencing

1

The trial court imposed sentences of 75 years to life each for counts 1 and 2 under the Habitual Sex Offender law (§ 667.71, subd. (b)) and imposed, but stayed, separate sentences under the One Strike law (§ 667.61) for each circumstance found true. Carson contends he cannot be sentenced under both statutes. The People contend the court properly imposed, but stayed, sentences under the One Strike law. The People concede, however, the court should have imposed only one sentence each for counts 1 and 2 under the One Strike law. (*People v. Acosta* (2002) 29 Cal.4th 105, 118 [One Strike law is an alternative sentencing scheme, not a sentence enhancement].)

There is a split in authority as to whether the court should stay or dismiss sentences when both the Habitual Sex Offender law and the One Strike law apply. (Compare *People v. Snow* (2003) 105 Cal.App.4th 271, 281–283 (*Snow*) [dismiss] and *People v. Johnson* (2002) 96 Cal.App.4th 188, 207–209 (*Johnson*) [dismiss], with *People v. Lopez* (2004) 119 Cal.App.4th 355, 360–366 [stay] and *People v. McQueen* (2008) 160 Cal.App.4th 27, 34–38 [stay].)

Our court has concluded the trial court should select which sentencing scheme to apply and then dismiss the sentences for the alternative sentencing scheme when both the One Strike sentencing scheme and the alternative Habitual Sex Offender sentencing scheme apply to a defendant's case. (*Snow, supra*, 105 Cal.App.4th at p. 284 ["Under circumstances in which the alternative sentencing schemes of section 667.61 and 667.71 apply, the sentencing court has discretion to choose one of the sentencing schemes[,] and then must strike or dismiss, rather than stay, the sentence under the other."]; *Johnson, supra*, 96 Cal.App.4th at pp. 207–209.) In the interests of consistency within our division, we conclude this is the appropriate procedure to follow unless the California Supreme Court resolves the issue otherwise.

Here, as in *Snow*, the sentences for counts 1 and 2 under the Habitual Sex Offender law and the One Strike law are the same. Because the court stayed the sentences under the One Strike law, we presume the court on remand would dismiss the true findings under the One Strike law. (*Snow, supra*, 105 Cal.App.4th at p. 284.) Therefore, we vacate the stayed sentences of 75 years to life and the stayed sentences of 45 years to life for counts 1 and 2.

2

The court stayed the sentence on count 7 pursuant to section 654, but imposed a one-year enhancement pursuant to section 12022.3, subdivision (b)(1). Carson contends, the People concede, and we agree the term for the enhancement must be stayed since the term imposed for the offense was stayed. (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1143.)

When the court pronounced judgment, it imposed, but stayed sentences for count 3. However, the felony minutes and the abstract of judgment indicate a four-year term for the enhancement on count 3 was imposed and not stayed. Carson contends, the People concede, and we agree the court's minutes and the abstract must be corrected to conform to the court's oral pronouncement of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

IV

DISPOSITION

We vacate the stayed sentences of 75 years to life imposed for counts 1 and 2 pursuant to section 667.61, subdivisions (a), (c), (d), and (e) as well as the stayed sentences of 45 years to life imposed pursuant to section 667.61, subdivisions (b), (c), and (e). We direct the clerk of the court on remand to amend the court minutes and the abstract of judgment to strike these sentences and to reflect the enhancements attached to

counts 3 and 7 are stayed. The clerk shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.